

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GIL-SCOTT MILLER,

Defendant-Appellant.

UNPUBLISHED

January 4, 2007

No. 263350

Wayne Circuit Court

LC No. 05-002020-01

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felony-murder, MCL 750.316, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, three counts of assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for his felony murder conviction, six to ten years' imprisonment for his assault with intent to do great bodily harm conviction, two to four years' imprisonment for his felonious assault conviction, 28 to 50 years' imprisonment for his assault with intent to rob while armed convictions, three to five years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first argues he was denied his right to a fair trial because the trial court failed to instruct the jury that aiders and abettors must have the same specific intent as the principal to be found guilty of a specific intent crime. However, defendant has waived appellate review of this issue. After the trial court read the instructions to the jury, the court asked the parties, "are you satisfied with the instructions?" The prosecutor replied, "very satisfied with the instructions," and defense counsel replied, "yes, your honor." By expressly approving the instructions, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues he was denied the effective assistance of counsel when defense counsel failed to move to suppress Henry Avery, Jr.'s and Winda Miller's in-court identifications of him as the assailant. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619

NW2d 413 (2000). However, if a claim of ineffective assistance of counsel involves a question of law, this Court's review is de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005), vacated in part on other grounds 720 NW2d 754 (2006). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra*, p 545. This Court has found that counsel's decision not to request a corporeal line-up and not to move for suppression of identification testimony were matters of trial strategy. *People v Wilki*, 132 Mich App 140, 145; 347 NW2d 735 (1984).

Defendant argues that Henry's and Winda's in-court identifications of him as the assailant were based on an improper photographic lineup and defense counsel's failure to challenge the use of the photographic lineup, in place of a corporeal lineup, denied him a fair trial. We disagree.

When in police custody, an accused should not be identified by a photographic lineup unless a legitimate reason for doing so exists. *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993), citing *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). A photographic lineup is permissible in place of a corporeal lineup if, among other things: (1) it is not possible to arrange a proper lineup, (2) the nature of the case requires immediate identification, or (3) there are insufficient number of persons available with defendant's physical characteristics. *Anderson, supra*, p 187 n 23.

Prior to trial, Henry and Winda identified defendant, based on a photographic lineup, as the gunmen that shot Henry and Lashawn Avery during a robbery. Although defendant was in custody when the photographic lineup was conducted, the record shows a corporeal lineup was impossible for at least two reasons: (1) there were insufficient number of persons available with defendant's distinctive physical traits, specifically his "extremely" light skin complexion; and (2) Henry was hospitalized with a gunshot wound. Under these circumstances, the photographic lineup was permissible and defense counsel was not deficient when he failed to move to suppress testimony concerning the photographic lineup. Because counsel is not obligated to make futile motions, defense counsel was not ineffective for failing to move to suppress the identification testimony. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Moreover, even if the photographic lineup was impermissible, the record establishes that both Henry and Winda had an independent basis for their in-court identifications of defendant. Thus, any error in admitting the pretrial identification would have been harmless beyond a reasonable doubt. *People v Solomon*, 220 Mich App 527, 531; 560 NW2d 651 (1996).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello